

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ALFONSO HERNANDEZ,

PLAINTIFF,

vs.

NO: CV-14-964 KG/SCY

ANDY FITZGERALD,

DEFENDANT.

10 TRANSCRIPT OF EXCERPT FROM THE TRIAL - VOLUME I
11 BEFORE THE HONORABLE KENNETH J. GONZALES
12 TUESDAY, MAY 28, 2019; 8:44 A.M.
13 ALBUQUERQUE, NEW MEXICO

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8 ALSO PRESENT: Mr. Brandon Cummings
9 Ms. Kaia Oliveros
Mr. Alfonso Hernandez
10 Mr. Andy Fitzgerald

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2 THE COURT: All right. Ms. Oliveros, you may call
3 your first witness.

4 MS. OLIVEROS: Your Honor, we call Andy Fitzgerald.

5 THE COURT: All right. Sir, if you may proceed to my
6 left into the witness stand. Please raise your right hand to
7 be sworn. Okay.

8 (Witness sworn.)

9 MS. HALL: Please state your name, and spell your
10 first and last name for the court reporter.

11 THE WITNESS: Andy Fitzgerald. Andy, A-n-d-y,
12 Fitzgerald, F-i-t-z-g-e-r-a-l-d.

13 MS. HALL: Thank you. Have a seat, please.

14 PLAINTIFF'S WITNESS ANDY FITZGERALD,
15 after having been first duly sworn under oath,
16 was questioned and testified as follows:

17 DIRECT EXAMINATION

18 BY MS. OLIVEROS:

19 Q. Good morning, Mr. Fitzgerald.

20 A. Good morning, counsel.

21 Q. You were hired by the City of Albuquerque to work at the
22 transit department in what year?

23 A. I believe 2008, 2009. I can't remember it offhand.

24 Q. 2009 sound about right?

25 A. 2009, right.

1 Q. And you were hired as a transit officer, right?

2 A. Yes, ma'am.

3 Q. And as a transit officer, I take it you had all of the
4 training in the use of force and in the -- and how to apply
5 force when it was reasonable.

6 A. Yes, ma'am.

7 Q. And you would agree with me, Mr. Fitzgerald, that you
8 can't use any more force than is necessary.

9 A. Correct.

10 Q. And if you use more force than is necessary, then you
11 might harm someone, right?

12 A. Right.

13 Q. And you would agree with me that using more force than is
14 necessary endangers the safety of the person.

15 A. Correct.

16 Q. And if you are using more force than is necessary you
17 might really hurt somebody.

18 A. Correct.

19 THE COURT: Mr. Fitzgerald, let me just invite you to
20 adjust the microphone or feel free to scoot up just a little
21 bit so that you can speak into the microphone.

22 THE WITNESS: How is that, Your Honor?

23 THE COURT: All right. That's much better. Thank
24 you.

25 Q. (By Ms. Oliveros) Thank you. And if you can't hear me,

1 Mr. Fitzgerald, just let me know.

2 A. Yes, ma'am.

3 Q. Now, you were also informed and you understand that if you
4 hurt someone by using more force than is necessary, that you
5 would take responsibility for that.

6 A. Correct.

7 Q. And that's important because you need to be accountable
8 for what you do.

9 A. Correct.

10 Q. And you were proud of your service at the Albuquerque --
11 City of Albuquerque as a transit officer, weren't you?

12 A. Yes, ma'am, I was.

13 Q. And you're proud because you felt that you were a
14 reliable, honest employee?

15 A. Yes.

16 Q. And did you try to do your job with honesty and integrity?

17 A. Honesty, integrity, and the best of my ability, ma'am.

18 Q. And part of that honesty that you needed to have in your
19 job is to honestly and completely report the use of force,
20 right?

21 A. Correct.

22 Q. And that's something that there's no question that you
23 have to report when you use force on anybody as a transit
24 officer.

25 A. Correct.

1 Q. And as a transit officer, you don't have the power to
2 arrest people, do you?

3 A. We have the power to detain, ma'am.

4 Q. And when you detain someone with handcuffs, that's like --
5 that's an arrest, isn't it?

6 A. It's not an arrest, but applying hand restraints is the
7 safety of myself, other officers, and other people, as well,
8 around the surrounding area.

9 Q. I'm sorry, what was that?

10 A. Surrounding areas.

11 Q. And in surrounding areas?

12 A. Yes.

13 Q. So as a transit officer, the City of Albuquerque armed you
14 with certain weapons and certain devices to help you if force
15 was needed, right?

16 A. Yes, ma'am.

17 Q. And part of that was your hands --

18 A. No, ma'am.

19 Q. -- that you can apply force by the use of your hands in
20 taking down folks, right?

21 A. Yes.

22 Q. So they didn't give you those, but that is one mechanism
23 for you to use force, is by your hands?

24 A. Yes.

25 Q. And if you use force with your hands, that has to be

1 reported and documented.

2 A. Correct, ma'am.

3 Q. And you can't leave anything out.

4 A. Correct.

5 Q. And another tool that you have -- or you have the OC spray
6 or pepper spray?

7 A. OC spray, handcuffs, and a baton, ma'am.

8 Q. Handcuffs, OC spray, and a baton.

9 A. Yes, ma'am.

10 Q. And those are all different ways, if you need to, you can
11 use force on someone?

12 A. In certain orders, ma'am.

13 Q. You have the handcuffs because you can restrain folks if
14 you decide that's what you need to do, right?

15 A. If that's the next step, if it escalates, ma'am.

16 Q. And when you restrain someone with handcuffs, you can
17 detain them and they're not free to leave, right, at times?

18 A. At times, yes, ma'am.

19 Q. Okay. Now, we're talking about the importance of
20 documenting the use of force. And you agree with that, it's
21 very important, don't you?

22 A. Yes, ma'am.

23 Q. And that's because if you have an occasion to use force
24 when it's absolutely necessary, then that is to be reviewed by
25 your supervisors, isn't it?

1 A. Yes, ma'am.

2 Q. And that's why you have to put -- you have an incident
3 report with the transit office, you have to fill out if you use
4 force?

5 A. Yes, ma'am.

6 Q. And you have to also indicate if force is used in your
7 logbooks, right?

8 A. In our logbooks?

9 Q. In your logs -- your daily logs.

10 A. Daily logs, yes, ma'am.

11 Q. So there's a couple of different ways that you are to
12 record when you use force.

13 A. I'm not understanding, ma'am. What are you saying?

14 Q. There's a couple different ways that you have to record
15 things if you use force. One is your daily logs, right?

16 A. Yes, ma'am.

17 Q. And then another way is an actual incident report,
18 correct?

19 A. Yes.

20 Q. Now, if APD is involved in a call, it's very important
21 that you cooperate with them, right?

22 A. Correct.

23 Q. And you work with the City of Albuquerque all the time
24 with respect to your detention of different folks and
25 especially trespass notices?

1 A. Yes, ma'am.

2 Q. Because you have to call them because you don't have the
3 authority as a transit officer to issue citations. That has to
4 be the police.

5 A. Correct.

6 Q. So you call them out and they're the ones that have to do
7 the official record.

8 A. Yes, ma'am.

9 Q. And you would agree with me that the information you give
10 the Albuquerque Police Department goes on the public record and
11 it's an official City document.

12 A. Ma'am, I don't know about the public record, about that,
13 2012 I wouldn't know nothing about that.

14 Q. Well, let's -- if you fill out a statement for APD, that's
15 an official statement, right?

16 A. Yes, ma'am.

17 Q. And that is to be 100 percent true and honest, isn't it?

18 A. Correct.

19 Q. And in those statements if you don't include everything
20 that's the truth, that would be a falsehood to the City,
21 wouldn't it?

22 A. Yes, ma'am.

23 Q. And so it's important for you when communicating with APD
24 to be honest and put everything that happened, especially with
25 respect to the use of force, in your statements.

1 A. Yes, ma'am.

2 Q. And even if you're not asked for a statement, if you use
3 force and APD is involved, you're duty-bound to tell them about
4 it, aren't you?

5 A. Yes, ma'am.

6 Q. So you have to tell them verbally, and then you also may
7 be asked for an official City statement that you can write.

8 A. Yes, ma'am.

9 Q. Now, you would agree with me that you can only trust and
10 rely upon documents that are accurate and honest and complete,
11 right?

12 A. Yes, ma'am.

13 Q. And you have not been complete in all of your reports with
14 respect to your job when you were a City employee as the
15 transit officer, were you?

16 A. That's not true, ma'am.

17 Q. Isn't it true that in December, on December 2nd of 2012
18 you failed to report that you used force which resulted in a
19 broken window and handcuffing an individual?

20 MS. MARTINEZ: Objection.

21 THE COURT: Hold on.

22 MS. MARTINEZ: Relevance.

23 THE COURT: Okay. Response?

24 MS. OLIVEROS: Well, Your Honor, he just testified
25 that he is honest with all his reporting about the use of

1 force, and I have incidents from his personal record --
2 personnel record where he has not been.

3 THE COURT: Okay. Well, that will be the question
4 for the jury, but I'll overrule the objection.

5 Q. (By Ms. Oliveros) In December 2nd of 2010, you were
6 involved in an incident that occurred on First and Central,
7 that's around the transit area, where there was an altercation
8 and you used force against a woman and you never reported
9 that. Right?

10 A. Yes, I did, ma'am.

11 Q. You're disagreeing with me?

12 A. I am disagreeing with you, ma'am.

13 Q. Well, you were disciplined for that, weren't you?

14 A. I believe I was.

15 Q. So the City of Albuquerque found that you didn't report
16 properly your use of force in that incident; isn't that true?

17 A. I don't recall that, ma'am.

18 Q. You don't recall that? Well, why don't I hand you your --
19 the March 3rd Interoffice Memorandum and see if that refreshes
20 your memory. Do you think that might refresh your memory?

21 A. If I may look at it, ma'am.

22 Q. Okay. So refreshing your memory, are you familiar with
23 that? If you look at this and it refreshes your memory about
24 what happened, then you can tell me about that and tell the
25 jury about it.

1 MS. MARTINEZ: Your Honor --

2 THE COURT: All right, Ms. Oliveros, would you show
3 the item to Ms. Martinez.

4 (Ms. Oliveros provided Ms. Martinez with the document.)

5 Q. (By Ms. Oliveros) Just look at it and let me know when
6 you're finished.

7 A. I remember this, but after the fact I was told to write a
8 statement --

9 THE COURT: Okay. Mr. Fitzgerald, just please let
10 Ms. Oliveros know when you've completed.

11 THE WITNESS: Yes.

12 Q. (By Ms. Oliveros) Okay?

13 A. When -- I finished it after -- after that incident, I was
14 told to write a statement on that matter.

15 Q. So you agree with me that you -- do you agree with me that
16 you failed to properly document the use of force on
17 December 2nd of 2010?

18 A. No, I don't agree.

19 Q. And, Mr. Fitzgerald, on December 31st of 2012, you used --
20 were found to have used excessive force on someone and you
21 didn't document that use of force. Do you recall that?

22 A. No, ma'am, I don't.

23 Q. You received a letter of warning on June 22nd of 2012 that
24 you detained a citizen for an extended amount of time without
25 notifying the Albuquerque Police Department and that there was

1 an unnecessary detainment and that you used excessive force.

2 A. Ma'am, I don't recall that at all.

3 Q. You don't recall an incident where you were found to have
4 used excessive force against a man in Albuquerque?

5 A. December 31st of 2012?

6 Q. Yes. Would it refresh your memory for me to show you --

7 A. Yes, ma'am.

8 Q. -- the Interoffice --

9 MS. MARTINEZ: Counsel, can I see it first.

10 (Ms. Oliveros provided the document to Ms. Martinez.)

11 Q. (By Ms. Oliveros) I'm going to give this to you,
12 Mr. Fitzgerald, and just let me know once you read it if that
13 refreshes your memory.

14 A. This was so long ago, I have no recollection of this,
15 ma'am.

16 Q. So that doesn't refresh your memory?

17 THE COURT: Was that a yes or a no?

18 A. No, I don't.

19 Q. (By Ms. Oliveros) It doesn't?

20 A. No.

21 Q. You don't deny, Mr. Fitzgerald, do you, that you used
22 excessive force on a man in December of 2012?

23 A. Ma'am, I don't know who was the man, what location it
24 happened at, at all. Like again, that was so long ago, I have
25 no recollection of nothing that happened there.

1 Q. So you don't take responsibility for using excessive force
2 against this individual that you were given a warning for in
3 2012 --

4 A. Again --

5 Q. -- December?

6 A. Again, ma'am, I have no recollection of that.

7 MS. OLIVEROS: Your Honor, I'd like to mark this as
8 Plaintiff's 15, Your Honor, as impeachment.

9 THE COURT: All right. Ms. Martinez.

10 MS. MARTINEZ: I need to see it again, Your Honor.

11 (Ms. Oliveros provided the document to Ms. Martinez.)

12 MS. MARTINEZ: Your Honor, can we approach?

13 THE COURT: You may.

14 (Bench conference on the record.)

15 MS. MARTINEZ: So the document on the back is, I
16 guess, his log, but it's from December of 2010, and the date of
17 the letter is June of 2012, but the alleged incident happened
18 in December of 2010, and there's no description at all of the
19 individual, the location, the conduct, so this is meaningless,
20 and it certainly doesn't go with the information on the back.
21 So -- And my client doesn't recall the incident.

22 THE COURT: Let me just take a look at what we have
23 here. So we have what appears to be a four-page document. And
24 the first page is an Interoffice Memorandum dated June 22nd,
25 2012, and it includes a back side, which is headed as Transit

1 Department and a handwritten log and then what appears to be
2 page 3, headed as Findings, and then the fourth page I can't
3 make out the entire heading of it, but it includes a
4 conclusion. So that's the document.

5 Ms. Oliveros --

6 MS. OLIVEROS: Your Honor --

7 THE COURT: -- relevance?

8 MS. OLIVEROS: -- I think I can get him to lay a
9 foundation for the document because it's his signature. That's
10 part of the issue with the authenticity of it. I'm not saying
11 the details are wrong. That's something I can have him verify.
12 It's relevant. He's testifying he is required to log every use
13 of force he finds important, and he always did it, and then
14 that he didn't give -- and that there is a finding, and he got
15 a letter of warning because he failed to properly -- I'm sorry,
16 let me read this here. (Reading) You were taught to report all
17 use-of-force incidents as a security officer and follow proper
18 detainment criteria as trained by APD. You did not note the
19 incident in your daily report or incident report.

20 I just talked about that. He said he always did
21 this. This shows that he didn't. He has -- He says he doesn't
22 recognize this or remember the incident, so it should be
23 admitted for impeachment value only, not as substantive
24 evidence, that it happened, to show that he did get this
25 warning and that he did -- and it was about a failure to log.

1 THE COURT: All right. Well, you might have to
2 remind me, but does the witness remember this event? It seemed
3 to me you attempted to claim -- One at a time. You're
4 attempting to refresh his recollection using this document.

5 MS. OLIVEROS: Right.

6 THE COURT: The witness stated he did not recall the
7 event.

8 MS. OLIVEROS: He said he didn't recall the event,
9 but I further am asking him about whether or not he recalls
10 being disciplined for it, and he's saying he doesn't remember
11 that. It's his signature on this. I mean, if it's premature
12 and I haven't laid the right foundation, I can ask him a few
13 more questions.

14 THE COURT: So you would offer it as extrinsic
15 evidence of something? What would that be --

16 MS. OLIVEROS: Yes, I'm offering it for the purpose
17 of showing that he is not credible, that he doesn't remember
18 that it existed, and this just is for impeaching his
19 credibility on his supposed lack of personal knowledge. I
20 think that's a proper purpose for it.

21 THE COURT: He doesn't remember the events. I don't
22 think you've established that he -- any sort of authentication
23 for the admission. I understand what you're trying to do.

24 MS. OLIVEROS: Right.

25 THE COURT: So for now I'm going to sustain the

1 objection. It's not admitted. You've attempted to impeach
2 him -- but he doesn't --

3 MS. OLIVEROS: Yes.

4 THE COURT: -- recall, at least that's his answer, so
5 we're left with this.

6 MS. OLIVEROS: So if I may lay a further foundation,
7 and I'll make an offer of proof at a break.

8 THE COURT: You can make an offer of proof. I've
9 just explained it. It's in the record, but it won't be
10 admitted.

11 MS. OLIVEROS: And I'll mark it as Plaintiff's 15,
12 Your Honor.

13 THE COURT: Okay. That's fine.

14 MS. OLIVEROS: Then I would ask to lay a foundation
15 for his signature on it.

16 THE COURT: Is there any dispute as to his signature,
17 Ms. Martinez?

18 MS. OLIVEROS: She just said --

19 MS. MARTINEZ: I don't know. It looks like his
20 signature, Your Honor, but I don't know.

21 MS. OLIVEROS: I think I need to do that in front of
22 the jury.

23 THE COURT: Okay. We can do it outside of the
24 presence of the jury just to establish the signature, but I'm
25 not going to allow the document itself.

1 MS. OLIVEROS: Okay.

2 THE COURT: Exhibit 15.

3 MS. OLIVEROS: Okay. Thank you. I've marked it.

4 THE COURT: Okay.

5 (Open court.)

6 Q. (By Ms. Oliveros) Mr. Fitzgerald, you recall that you
7 were disciplined for the use of excessive force and your
8 failure to report that force, right?

9 A. I believe, yes.

10 Q. And you actually signed the letter of warning, you signed
11 that sometime in June of 2012, right?

12 A. I signed something, but I don't know the year or the
13 month.

14 Q. So it might have been in June of 2012, but you know you
15 signed a letter of warning about your failure to report your
16 use of force and also about your excessive use of force. You
17 signed a letter of warning about those things.

18 A. Yes, ma'am.

19 Q. That those happened.

20 A. Yes, ma'am.

21 Q. You're just telling the jury that you don't remember the
22 person --

23 A. I don't remember --

24 Q. -- that was hurt --

25 A. -- at all, ma'am, because there was no report made. The

1 only report -- There's a name who we have to put down, the
2 description, what he looks like, ma'am.

3 Q. There's no report made. What do you mean by that? There
4 was no report? There was no report for the excessive force?

5 A. Not I recall, ma'am. And I don't know who the
6 individual's name is.

7 Q. But you know you hurt him.

8 A. No, I didn't, ma'am.

9 Q. So you don't take responsibility for that?

10 A. I take responsibility, but I would not take responsibility
11 of excessive force. I take responsibility for not -- for not
12 making a report out.

13 Q. And you know that when you don't report that you use
14 excessive force or any force, you know that that creates a
15 situation where no one gets to review what you do unless
16 someone complains. Right?

17 A. Yes, ma'am.

18 Q. So you take -- you take the power away from the
19 supervisors when you don't report it for people to look into
20 what happens and decide whether what you did was justified or
21 unconstitutional. You take that away when you don't report it.
22 Isn't that true?

23 A. I don't take away from anybody's position and power.

24 Q. There were other times when you failed to log where you
25 were with the City of Albuquerque and you got in trouble for

1 that. Didn't you?

2 A. Excuse me?

3 Q. Other times when you failed to log where you were or what
4 you were doing and you got in trouble for that, didn't you?

5 A. I got in trouble, but there would be a lot that would be
6 going on and you would have a tendency to forget. It has
7 happened not only with myself, ma'am.

8 Q. Well, we're only talking about you today and what you
9 remember about what you do. So you don't -- You agree with me
10 that there were other times where you did not report or log
11 where you were or what you were doing so that your supervisor
12 would know. You would agree with that?

13 A. I would agree with that. Again, there would be other
14 times things would be going on, you have a tendency to forget.

15 Q. Well, you remember everything about what happened with
16 Mr. Alfonso Hernandez, don't you, on the day -- this day,
17 August 30th, 2012? You remember everything about that, don't
18 you?

19 A. Vaguely.

20 Q. Isn't it true, Mr. Fitzgerald, that you only remember that
21 he supposedly assaulted you, and you don't remember anything
22 else about what happened?

23 A. Ma'am, I can say this, ma'am. Things happened so fast,
24 true, but I can't go back in time, and I'm not going back in
25 time 'cuz -- I'm not saying I don't want to remember, don't get

1 me wrong, but things happened so fast. If I could have done
2 something differently, yes. I have no problem with that.

3 Q. Are you saying you couldn't have done anything differently
4 than what you did?

5 A. I'll say it again, counsel. If I go back, turn hands back
6 of time, if I did things differently, I would. I have no
7 problem with that. I'm not saying I object to what you have
8 asked me.

9 Q. You recall choking my client Alfonso Hernandez?

10 A. Ma'am, if I remember choking him, I would, but in this
11 case, ma'am, no.

12 Q. Isn't it true that you testified at your deposition that
13 (Reading) Alfonso had some sort of device that he was recording
14 me, and I asked him who are you? Why are you recording me?

15 And you said, he jumped up and started swinging, you
16 tried to -- you tried to defend yourself, and that's all you
17 remember. Did you say that?

18 A. Yes, ma'am.

19 Q. So that's all that you remember sitting here today when
20 you look back at the incident. Is that all that you remember?

21 A. What happened after that, there was contact made by the
22 plaintiff, Mr. Alfonso Hernandez. I do remember that.

23 Q. You claim that you saw -- you saw Mr. Hernandez, you saw
24 that he had a recording device, right?

25 A. At the last minute, ma'am, I looked down.

1 Q. And before you saw that he had a recording device, you
2 never asked him to leave the area, right?

3 A. No. He was -- He asked me what time the bus come, so I
4 believe he's waiting on the bus at that stop.

5 Q. Okay. So you didn't know what he was doing?

6 A. No.

7 Q. Never at any time did you ask him to leave the area before
8 you tried to get his phone from him, right?

9 A. No, ma'am.

10 Q. You never did?

11 A. No.

12 Q. You never said, "Please move away."

13 A. No.

14 Q. And you never said, "Sir, please, you're standing too
15 close." You never said that?

16 A. No.

17 Q. And you never said, "Sir, you're interfering with my --
18 this guy that I've got here, Manuel." You never told that he
19 was interfering?

20 A. I said something to that nature, but at that time he was
21 waiting on the bus.

22 Q. So when you saw that he was recording, it was the fact
23 that he was recording, not that he might have -- not that there
24 was some interference, it was only the fact that he was
25 recording that made you want to stop him, right?

1 A. Yes, ma'am.

2 Q. It had nothing to do with the guy you were detaining.

3 A. Ma'am, I'm not a doctor. I don't know what his mind frame
4 was. I'm going to tell you the truth about that. But in my
5 training in the military all these years, the way this society
6 is today, terrorists, I have training, terrorist training, they
7 have a tendency of taking pictures and recording locations,
8 people. I take that very seriously.

9 Q. In fact-- I'm sorry, I didn't mean to cut you off.

10 A. And in this case, ma'am, to tell you the truth,
11 Mr. Hernandez shown an example of what he did, 'cuz like I
12 said, when I asked him who he was, "Who are you?" he never gave
13 me a name.

14 Q. You did not want to give him a chance to answer you,
15 right?

16 A. Ma'am --

17 Q. That's what you said.

18 A. -- no, I didn't say I didn't give him a chance. I asked
19 him his name.

20 Q. And you immediately went for his phone and took him down.

21 A. No.

22 Q. Mr. Fitzgerald, you said you took it very seriously that
23 Mr. Hernandez had a recording device, right?

24 A. Correct.

25 Q. And that put you on high alert. Right?

1 A. Yes.

2 Q. And you're saying that -- Do you think that if someone
3 records you in the city of Albuquerque when you're working as a
4 transit officer, that you can take their phone? Is that
5 what -- Is that what you think?

6 A. No, ma'am, I'm not saying that.

7 Q. Well, those -- This wasn't the rule, was it? The rule is
8 that people can record transit officers.

9 A. The rule is -- I never seen it in black and white, ma'am,
10 in the City of Albuquerque. I have not seen to this day,
11 ma'am, when it's a rule to record buildings, people, families,
12 et cetera. Again, ma'am, I have training in this.

13 Q. The training at the City of Albuquerque is that you have a
14 First Amendment right to record in public places, public
15 employees. You know that, don't you?

16 A. I thought it was a rule that I give you consent.

17 Q. So in your mind Mr. Fitzgerald [sic] did not have your
18 consent to record you, right? Is that what you're saying?

19 A. He didn't have consent to sit by my detainee. He did not
20 have consent to record what was going on, 'cuz, like I said, I
21 am trying to protect the scene.

22 Q. You're trying to what?

23 A. Protect the scene of the detainee. Not only myself, my
24 partner, and people that was around.

25 Q. When you -- When you saw that Mr. Hernandez had a cell

1 phone and was recording you, that put you in a state of high
2 alert, right?

3 A. Yes, ma'am, 'cuz I did not know who he was.

4 Q. And that concerned you for your safety and the safety of
5 your family, right?

6 A. Correct, ma'am.

7 Q. And you weren't -- you weren't concerned about your
8 detainee's safety. It was you and your family.

9 A. No, ma'am. I am concerned, myself, my detainee, and
10 others around that surrounding area of that area where it
11 happened.

12 Q. Do you recall when I deposed you back in November of 2017?
13 Do you recall that?

14 A. I'm sorry, ma'am?

15 Q. Do you recall when I deposed you in Chicago in your
16 deposition in November of 2017?

17 A. Yes, ma'am.

18 Q. And I asked you --

19 MS. MARTINEZ: Counsel, page and line, please.

20 MS. OLIVEROS: Hold on one moment.

21 I'll have to come back to that, actually.

22 Q. (By Ms. Oliveros) Okay. Mr. Fitzgerald, when you
23 took -- When you felt that you were on high alert, you went
24 into what you call survival mode, right?

25 A. Yes, ma'am.

1 Q. And it's when you're in survival mode you don't know
2 what's going on around you, right?

3 A. Correct.

4 Q. That's what you said.

5 A. Yes.

6 Q. And when you're in survival mode, you're in a state of
7 rage?

8 A. No, that's not what it means.

9 Q. But you can't remember anything that happens when you're
10 in survival mode, right?

11 A. Correct.

12 Q. And that's because you are trying to protect yourself?

13 A. Yes, ma'am.

14 Q. And you claim that you don't remember anything that
15 happened after you went into survival mode with respect to what
16 happened with Alfonso Hernandez and yourself, right?

17 A. Basically, yes.

18 Q. And you went into survival mode as soon as you saw that he
19 was recording you and that he didn't give you his name, right?
20 That's -- That triggered you.

21 A. No, it didn't trigger me. It triggered me with the
22 camera, ma'am. Like I said, today's society.

23 Q. As soon as you saw the camera?

24 A. Yes. And I took that very seriously. So I have to get
25 out of a situation before it escalates more.

1 Q. And you were going to stop the threat no matter what it
2 took.

3 A. No matter what it took, yes, ma'am, because I have no -- I
4 don't -- I don't know what his intentions was with that video.

5 Q. And stopping the threat might mean killing someone, right?

6 A. No.

7 Q. I'm going to play for you what's already been admitted as
8 Plaintiff's 2A. Oh, I'm sorry, Plaintiff's 1. I'll start with
9 Plaintiff's 1. That's the cell that has video and audio of
10 your interaction with Mr. Hernandez. Have you seen that?

11 A. I've seen it, ma'am.

12 Q. You've seen it before today, right?

13 A. Yes, ma'am, I have.

14 MS. OLIVEROS: We have practiced this, but I'm not
15 sure what --

16 THE COURT: Well, let me just explain to the jury.
17 It's an audio-video exhibit that the Court has admitted with
18 the parties' agreement.

19 Ms. Oliveros, is this from the beginning or are you
20 taking segments of it? Explain to the jury where if -- in the
21 jury you would start your demonstration.

22 MS. OLIVEROS: We're going to start at -- We're
23 admitting the entire audio-video, Your Honor, with the cell
24 phone that's 4 minutes and 22 seconds, and we're going to start
25 by playing the first segments, and we'll -- I guess I'll

1 identify them as we go, and I'm going to be checking in with
2 Officer Fitzgerald about what's happening in the frame that we
3 start.

4 So I'll start with 1A, Your Honor.

5 Q. (By Ms. Oliveros) Now, Officer Fitzgerald, while they're
6 getting that going --

7 MS. OLIVEROS: Let me know when you have it --

8 Q. -- this was daylight when you first encountered
9 Mr. Hernandez, when you first encountered Alfonso Hernandez, it
10 was still daylight, but it was about 7:30 in the evening; is
11 that correct?

12 A. Approximately, yes.

13 Q. Okay. And at that time it was you and Officer Powdrell
14 that were on the scene in downtown Albuquerque at the -- at the
15 transit area, right?

16 A. Correct.

17 Q. Okay. And let me just go ahead and show you what's -- If
18 I can -- Let me just orient you on the ELMO.

19 MS. OLIVEROS: Can I switch this over to the ELMO?
20 Just so the jury knows where we're at.

21 Okay. So I have Plaintiff's Exhibit 5A on the ELMO,
22 and I don't know if you-all can see it on your screens. Can
23 y'all see that?

24 Q. So, Officer Fitzgerald, back in 2012 in downtown
25 Albuquerque, could you just please show the jury where is the

1 Alvarado transit center on this. Could you mark that or just
2 point at it with your --

3 A. (Indicating.)

4 Q. You can just put your finger on the screen and show them.

5 A. (Indicating.)

6 Q. Okay. So it's over here with this clock?

7 A. Yes, ma'am.

8 Q. Okay. If you -- Okay. And then the bus stop where you
9 had Manuel Bustamante, the detainee, where is that if you can
10 just show the jury by -- Do you know how to circle it within
11 the ELMO?

12 You have a little square.

13 MS. OLIVEROS: Do you all see that?

14 Q. I think if you put your hand up on the pencil on the
15 right-hand corner, Mr. -- Yes. Okay. Right. Great.

16 So on Exhibit 5 you've got a red circle around --
17 that's the bus in that triangle where Mr. Bustamante, your
18 detainee, was, right?

19 A. Correct.

20 Q. Okay. And you were there with Officer Powdrell, correct?

21 A. Yes, ma'am.

22 Q. In the beginning.

23 All right. And then -- So there wasn't a whole lot
24 of room around -- There wasn't a whole lot of space around the
25 actual bus stop where you were at, and that's where the bus is

1 stopped in front of, right there on First Street, right?

2 A. Yes, ma'am.

3 Q. All right. And then you now have circled with a red
4 circle on the ELMO the Alvarado -- is that the transit center?

5 A. The one with the big circle?

6 Q. Yes.

7 A. Yes, that's the transit center.

8 Q. And that's where you and the transit officers have your
9 office and all your paperwork, and everything's just right
10 there, right?

11 A. Well, yes. Well, not where I circled it, but further
12 back.

13 Q. So if you could tell the jury, and just put on directions,
14 where is north, where is south, east, and west, if you could
15 maybe -- To the north, if you can mark with, again, the pen,
16 put an N where the northern direction is on that intersection.
17 If you click again with --

18 A. Okay. It's been so long, I don't know where north, east,
19 south, west is.

20 Q. Okay. Maybe another witness might help us out.

21 A. Okay.

22 Q. Okay. So your -- actually, your headquarters for the
23 transit office it's not where you circled where we can see,
24 right?

25 A. I'm sorry?

1 Q. The headquarters where your transit office is, it's not on
2 this side of the building?

3 A. No, it's not.

4 Q. Okay. So it's on the other side of the building?

5 A. Where the buses come in and out.

6 Q. And that's to the -- that's back behind -- to the south?

7 A. Yes, right next-door to the Greyhound bus station, if I'm
8 not mistaken.

9 Q. Well, let me see if maybe -- let me put up Plaintiff's
10 Exhibit 4E.

11 MS. OLIVEROS: Which has been admitted, Your Honor.

12 Q. Could you just -- Maybe I can do this. Okay. I have
13 cleared it. I don't know why my -- I've got this glare here.

14 Okay. Can you -- Looking at 4E -- Looking at 4E, can
15 you show the jury where your offices were, if it's possible to
16 with this photograph.

17 A. Ma'am, it's so dark on my end --

18 Q. Just the general area. Just for orientation.

19 A. Okay.

20 Q. You can use that pen.

21 A. It can help --

22 Q. So you have a red circle and it's down First Street down
23 back there. And that's where your office -- that's where the
24 office was?

25 A. Yes.

1 Q. Okay. And just for reference and distance, and I know
2 that you don't have a measurement, but about how far away is
3 that, if you could tell the jury?

4 A. I couldn't even tell you, ma'am.

5 Q. But it only takes a few minutes to walk there?

6 A. Yes.

7 Q. It's less than -- it's like maybe half of a block at the
8 most.

9 A. Actually, that's one block. Considering where the buses
10 go in and out, that's one block.

11 Q. Okay. So -- And it's always -- blocks are different
12 distances, but it's just -- it's just a short walk away, right?

13 A. Give or take.

14 Q. Yes. And that's where you get your citations, and you
15 have an office there, and that's where you make your reports?

16 A. Yes, ma'am.

17 Q. And your supervisors are there?

18 A. Yes, ma'am.

19 Q. And then just for the orientation, what we're seeing here
20 in this particular Exhibit 4E, is this over here to the left,
21 is that the bus stop where this encounter with Mr. Hernandez
22 occurred?

23 A. Yes, ma'am.

24 Q. Okay. So it's not the other ones on the other side.

25 All right. Let me show you Exhibit 4A. Can you tell

1 the jury, if you remember, where Mr. Hernandez was sitting when
2 you went to get his phone from him. Where was he sitting?
3 A. To --
4 Q. Exhibit H.
5 A. -- I believe (indicating).
6 Q. You put a circle?
7 A. Yes.
8 Q. That's fine.
9 A. Yes, ma'am.
10 Q. And then where was the person you were writing up for
11 trespassing, Manuel? Where was he?
12 A. (Indicating.) And at the time -- If I may, counsel, he
13 moved from -- Well, let me put this down. 1. Based on further
14 over here, 2.
15 Q. Okay. So with the 1, you put where Manuel was?
16 A. Yes, ma'am.
17 Q. And that's where he was at first?
18 A. Yes, ma'am.
19 Q. Okay. And then you put a 2 and a circle where Manuel
20 was -- where he moved to?
21 A. Right.
22 Q. When did he move from 1 to 2 based on your memory of what
23 actually happened?
24 A. If I remember, when APD came, I don't know what officer
25 told him to move. That's where he moved to.

1 Q. So after --

2 A. Yes.

3 Q. -- you tried to get the phone from Mr. Hernandez?

4 A. Yes, ma'am.

5 Q. When you saw Mr. Hernandez sitting on that bench and he
6 had the phone, what exactly was he doing?

7 A. He was -- If I can remember -- Fidgeting, moving, and
8 that's when I saw the phone directly towards myself.

9 Q. And where was -- where was the phone on his body? How was
10 he holding it, that you can remember?

11 A. Lower part of the body. Lower -- Lower -- Right where
12 your hand is at, ma'am.

13 Q. Would you please stand up --

14 A. Yes, ma'am.

15 Q. -- and show the jury how exactly you recall Mr. Hernandez,
16 if you can.

17 A. If I may.

18 Q. Just show them how you saw him holding the phone.

19 THE WITNESS: If I may, jurors.

20 Your Honor, if I can use this seat for an example, if
21 it's okay with you.

22 Q. Please.

23 MS. OLIVEROS: I'm sorry, Judge.

24 Q. (By Ms. Oliveros) Okay.

25 A. It was down here.

1 THE WITNESS: If you can hear me.

2 A. It was down this low.

3 Q. All right. And you can visibly see that --

4 A. Yes, we see it.

5 Q. -- it was there.

6 He wasn't hiding it?

7 A. No, he wasn't hiding it.

8 Q. And when you say he was fidgety, what do you mean by that?

9 Can you show the jury what he was doing that made you say that.

10 A. I -- When -- I can't recall if he was wearing a jacket or
11 not. It's like he pulled it out like very hesitant.

12 Q. Pulled what out?

13 A. His phone. Slowly put it down like this. Can't remember
14 what type of phone it is. He had it pointed direct- --
15 directly towards me.

16 Q. Sure. The phone was pointed at you to record you.

17 A. Right.

18 Q. Right?

19 A. Correct, ma'am.

20 Q. What's the fidgeting? You said he was fidgeting.

21 A. Again, ma'am --

22 Q. Was that important to you, that he was fidgeting?

23 A. Very important to me, ma'am.

24 Q. Okay. I've never -- This is the first time I'm hearing of
25 you saying --

1 A. Yes.

2 Q. -- he was fidgeting.

3 Show me by your movements what he did that appears he
4 was fidgeting.

5 A. He was fidgeting, moving around, I guess, trying to adjust
6 himself, get a good view.

7 Q. Okay.

8 A. And then I come (indicating) the camera very slowly.

9 Q. You're saying you saw the camera came out slowly? It
10 wasn't out?

11 A. No, it wasn't out.

12 Q. Okay. And the fidgeting, you showed the jury the
13 fidgeting that you saw.

14 A. Yes, ma'am.

15 Q. But are you saying that that was some evidence of a crime?

16 A. No, I'm not saying evidence of crime, ma'am.

17 Q. Well, do you -- do you agree with me, Mr. Fitzgerald, that
18 at that moment -- you had no reasonable suspicion that
19 Mr. Hernandez at that moment was about to commit a crime.

20 A. Ma'am, I don't know what his mind frame was. I can't
21 think for him.

22 Q. That --

23 A. In other words, a split second.

24 Q. Well, you had -- this -- you had several minutes with him,
25 didn't you?

1 A. It's not all about the minutes. It's not all about the
2 seconds.

3 Q. My question to you, Mr. Fitzgerald, was, when you saw him
4 there with his phone and the way that you've described it to
5 the jury, was Mr. Hernandez -- did you think he was about to
6 commit a crime or did you have reasonable suspicion that he was
7 in the middle of a criminal conduct?

8 A. Possibly.

9 Q. What are the specific grounds for your statement and your
10 testimony to the jury that Mr. Hernandez with his phone was
11 committing or about to commit a crime?

12 A. Interfering with my detainee. That has no concern of him.
13 And I don't know if they were together or not.

14 MS. OLIVEROS: Okay. Can we play the video now, or
15 did I by putting up those -- Let's start it at -- Well, let's
16 just start it at the beginning, 1A.

17 THE COURT: And this is Exhibit 1?

18 MS. OLIVEROS: It's Exhibit -- Yes, Your Honor, it's
19 Exhibit 1, specifically 1A.

20 (Playing video.)

21 Q. (By Ms. Oliveros) Now, did you see yourself in this
22 portion of this video 1A, Mr. Fitzgerald?

23 A. I believe that's me.

24 MS. OLIVEROS: Back it up to where . . .

25 Q. (By Ms. Oliveros) Okay. And is this on First and

1 Central here where you talked about?

2 A. Yes, ma'am.

3 Q. All right.

4 (Playing video.)

5 Q. Okay. Is that you?

6 A. Yes, ma'am.

7 THE COURT: Okay. Was that first exhibit 1A?

8 MS. OLIVEROS: Yes.

9 THE COURT: And the second, what was that? Was that
10 also 1A or 1B?

11 MS. OLIVEROS: Well, we haven't played 1B, Your
12 Honor, but I think what I'd like to do is just play all of 1
13 first and then go back and break it up. I think that would be
14 a little easier for the jury.

15 So let's play Exhibit 1. And let's make sure we have
16 the volume up.

17 THE COURT: Okay. And Exhibit 1 is 4 minutes and 22
18 seconds?

19 MS. OLIVEROS: Yes, Your Honor.

20 THE COURT: Okay. Is there something else you can
21 get to while we're waiting for the video, counsel?

22 MS. OLIVEROS: I think that it's -- should be
23 playing. I apologize, Your Honor. Okay. Is it up on the
24 screens? Okay. It's up on their screens, so we should be able
25 to play it now.

1 (Playing video.)

2 Q. (By Ms. Oliveros) Now, Mr. Fitzgerald, you recall what
3 happened that day, don't you?

4 A. As much as I don't want to remember it, but I -- somewhat.

5 Q. Now, you -- you saw the video just now, as the jury did,
6 and you remember that you never asked Mr. Hernandez to move.
7 You immediately told him "Why are you recording me?" And you
8 didn't give him a chance to even respond. You saw that.

9 A. Yes, I did.

10 Q. And it wasn't about the other man. It was about just the
11 fact that he was recording you.

12 A. It was about the other man and just recording, ma'am.

13 Q. Now, you understood in that moment that you had no
14 authority to confiscate or take Mr. Hernandez's cell phone,
15 right? You knew that.

16 A. If I knew that, ma'am, the policy were being placed. His
17 phone was taken, but it was given back to him.

18 Q. Do you remember at your deposition when I asked you, page
19 97, line 7 to 9: "Did you believe you had the authority to
20 confiscate it?" And you said, "No, I did not." Do you
21 remember that?

22 A. Yes.

23 Q. That's what you said in your deposition. And you didn't
24 have the authority to take Mr. Hernandez's phone, did you?

25 A. No.

1 Q. But you did it anyway. Right?

2 A. Correct.

3 Q. And you took it, and you were looking through it after
4 this, weren't you?

5 A. Yes.

6 Q. You wanted to see what he recorded, and you had your hands
7 on his phone, right?

8 A. To see what I recorded, but I never found what was
9 recorded that time. I don't know what type of phone he has
10 when I confiscated it. I didn't look at what brand, what style
11 of phone it was.

12 Q. But you were trying to get it?

13 A. To get it to give to the police, what was found.

14 Q. Well, it wasn't contraband. You know that.

15 A. Okay, ma'am.

16 Q. You know that. You didn't have a right to take it.
17 Right?

18 A. Correct.

19 Q. You were never going to give it to the police. You just
20 wanted to look at it for yourself.

21 A. That is wrong, ma'am. Everything that transit works for,
22 if we find anything, we pass it on to the officers and they
23 decide what to do with it from there.

24 Q. But you can't take property of citizens that you have no
25 right to take and give it to the police.

1 A. Again, ma'am, I got the phone. I was going to pass it to
2 the officers. And that's when I decided to give the phone
3 back.

4 Q. And you remember that?

5 A. Yes, I do.

6 Q. Do you claim that Mr. Hernandez was standing up when you
7 first -- when you -- right after you saw him recording, you
8 claim he was standing up and that he threatened you?

9 A. Vaguely.

10 Q. Well, then let's play 1C. Let's look at 1C.

11 (Playing video.)

12 MS. OLIVEROS: Is that the whole thing? Okay.

13 Q. (By Ms. Oliveros) In 1C, Mr. Fitzgerald, let me just get
14 this straight, though. You are a security guard in this
15 video, you're a security guard for the City of Albuquerque and
16 not a police officer, right?

17 A. Not a guard, ma'am. An officer.

18 Q. So when someone says "security guard," "City of
19 Albuquerque security guard," does that upset you?

20 A. That's not my title, ma'am, at the time.

21 Q. Well, you are there to protect the security of the
22 citizens riding buses, right? It's your job.

23 A. The buses, Alvarado transit is where, ma'am.

24 MS. OLIVEROS: Okay. Let's play 1 -- Was that 1C?

25 UNIDENTIFIED SPEAKER: That was 1C.

1 MS. OLIVEROS: Okay. Play 1D, then.

2 (Playing video.)

3 Q. (By Ms. Oliveros) So you just saw in 1D, Mr. Fitzgerald,
4 you were standing above Mr. Hernandez, weren't you, when you
5 were questioning about "Who are you?"

6 A. Yes, ma'am.

7 Q. So he was sitting down, right?

8 A. Yes.

9 Q. And he never stood up and threatened you, did he?

10 A. He stood up after the fact, ma'am.

11 Q. After what -- After when?

12 A. After "Why are you filming me?"

13 Q. So you -- He was sitting down. You're saying he stood up
14 and then you took him down to the ground immediately
15 afterwards, right?

16 A. No. He stood up and took a swing at me. I couldn't tell
17 you which hand.

18 Q. Did he take a swing at you?

19 A. Yes, ma'am.

20 Q. But you don't remember which hand?

21 A. No, ma'am.

22 Q. And you don't remember if he had a -- his hand was in a
23 fist or what?

24 A. No, ma'am.

25 Q. But you're saying that you remember that he took a swing

1 at you?

2 A. Took a swing, ma'am, and I blocked it.

3 Q. Isn't it true that he never hit you, that he --

4 A. Again --

5 Q. -- that you're saying he swung at you and missed you?

6 A. He swung at me and I blocked him, ma'am. I blocked the
7 swing.

8 Q. Isn't it true -- And that would be -- If he hit you,
9 that's a battery, right?

10 A. Yes, ma'am.

11 Q. And isn't it true that you testified that Mr. Hernandez
12 never battered you, right?

13 A. If you're referring if I was injured, I was not injured,
14 but my understanding, to my understanding of what was told to
15 me, if you're swung and you block, that's a battery. I was not
16 aware of that. I took it as a noninjury since I blocked it.

17 Q. So when -- At your deposition, when you said on 103, line
18 22, to all the way on 104, line 4, I asked you: (Reading)
19 That's where I'm trying to understand. Were you battered, no
20 bruised or battered? It was just an assault, not battery.

21 Question line 24. (Reading) So you never -- you
22 weren't battered by him?

23 Answer: (Reading) No. No. I didn't go to the
24 hospital, nothing.

25 Right? You were never battered?

1 A. Again, ma'am, my understanding, was told to me, that
2 battery on contact when I blocked -- blocked the swing, it is
3 told to me is a battery. I did not go the hospital. I was not
4 hurt in any way.

5 Q. But if somebody batters you, that's very different from an
6 assault. An assault's just a threat, and a battery means they
7 touched you, correct?

8 A. If that's the definition of it, yes.

9 Q. Well, I'm asking you. Isn't it true, with your training
10 that you had, that you understand there is a big difference
11 between an assault and a battery?

12 A. Yes.

13 Q. And you know that an assault is a threat or a fear of a
14 threat, right?

15 A. Yes.

16 Q. And a battery is if someone touches you, right?

17 A. Yes.

18 Q. And those have very different consequences, don't they?

19 A. I'm not sure.

20 Q. Well, when you write up reports, it's important for you to
21 tell whoever it is that you want to look into this, if it's an
22 assault or a battery, that it's -- There's a big distinction in
23 the law, isn't there?

24 A. Yes, ma'am.

25 Q. And in your Answers to Interrogatories, those are the

1 sworn statements that you wrote and you provided in this case,
2 you claimed that Mr. Hernandez assaulted and battered you,
3 right?

4 A. I can say the battery part. The assault part, I didn't go
5 that far with it during that day.

6 Q. But -- I understand you're saying that now, but when
7 you -- when you filled out your Answers to Interrogatory under
8 Number 13, the question about what happened with plaintiff, you
9 said, "The plaintiff assaulted and battered Mr. Fitzgerald."
10 You said that under oath, right?

11 A. Ma'am, we're talking about two years ago.

12 Q. Would it refresh your recollection to look at your answer
13 to that question, that sworn question and your answer since it
14 was two years ago?

15 A. Two years ago, it won't be no need, ma'am.

16 Q. So would it help you to look and see what you wrote under
17 oath?

18 A. No, ma'am.

19 MS. OLIVEROS: Your Honor, I move to admit the
20 answer and question to Interrogatory Number 13 as an admission
21 of a party opponent.

22 THE COURT: Ms. Martinez.

23 MS. MARTINEZ: No objection, Your Honor.

24 THE COURT: All right. You may go ahead. What would
25 that be marked?

1 MS. OLIVEROS: It would be Plaintiff's Number 16,
2 Your Honor.

3 (Plaintiff's Exhibit 16 admitted into evidence.)

4 MS. OLIVEROS: And I will address the exhibit for the
5 other questions.

6 Q. (By Ms. Oliveros) Okay. Let me show you what's been now
7 marked as Plaintiff's Exhibit 16.

8 Mr. Fitzgerald, will you -- you can go ahead and look
9 at your answer to Interrogatory Number 13. Do you see that
10 now?

11 A. Yes, ma'am.

12 Q. And at least in that court document -- in document -- in
13 that evidence you said that the plaintiff assaulted and
14 battered you.

15 A. I couldn't distinguish the two, ma'am.

16 Q. You couldn't distinguish the two. Well, that's just
17 wrong, isn't it? That answer's not true, right? Because I
18 want -- the jury needs to know. That's wrong, isn't it?

19 A. Are we talking about the assault or are we talking about
20 the battery or are we talking about both?

21 Q. Your answer to Interrogatory Number 13.

22 A. Again --

23 Q. That is not a correct answer, is it?

24 A. -- it's not a correct answer.

25 THE COURT: Ms. Oliveros, so if you can just explain

1 to the jury what the question was and the answer as it's in the
2 exhibit.

3 MS. OLIVEROS: My question was -- You want me to read
4 the interrogatory, Your Honor?

5 THE COURT: You can go ahead and publish the question
6 in the interrogatory as well as the answer.

7 MS. OLIVEROS: Okay. I will read it, Your Honor.

8 Q. (By Ms. Oliveros) Interrogatory Number 13,
9 Mr. Fitzgerald, and ladies and gentlemen of the jury, the
10 question, Interrogatory Number 13: (Reading) Please state
11 your contention, including the reasons therefore whether on or
12 about August 30, 2012, you were authorized to detain plaintiff
13 as described in his Complaint whether -- and I need 1, that's
14 [sic], that's a mistake, I think -- (Reading) or not you agree
15 that you did so detain plaintiff and whether you contend that
16 you were authorized to use force against plaintiff whether or
17 not you agree that you used any force.

18 Answer: (Reading) The plaintiff assaulted and
19 battered Mr. Fitzgerald.

20 That was -- That was your answer under oath in your
21 interrogatories, correct?

22 A. Yes, ma'am.

23 Q. And that's not true?

24 A. That's not true, but the battery part I will. What was
25 told prior distinguish the two to -- prior to today.

1 Q. You didn't know the difference?

2 A. No, ma'am.

3 Q. And you said that the plaintiff swung at you, right?

4 A. Yes, ma'am.

5 Q. Now, you mentioned earlier Officer Galvan. He's going to
6 testify here today, but he came up right after this incident
7 when you had detained plaintiff and he was sitting in
8 handcuffs, right?

9 A. Yes, ma'am.

10 Q. And you told Officer Galvan what happened, right?

11 A. Yes.

12 Q. And it was important to you that you told him everything
13 and that you were honest with him, correct?

14 A. The best to my knowledge, ma'am.

15 Q. And you told Officer Galvan that you -- Let me make sure
16 I'm clear on this. You told Galvan that you had told
17 Mr. Hernandez to move before you went to take his phone.
18 That's what you told Officer Galvan, isn't it?

19 A. Ma'am, are we talking about -- I can't turn the hands back
20 in time, ma'am.

21 Q. Well, that's what --

22 A. I don't know -- I don't know the conversation because,
23 ma'am, that was so long ago.

24 Q. You don't remember?

25 A. I don't remember from word from word.

1 Q. Well, you knew when you were talking about -- to Officer
2 Galvan that he was going to write a Criminal Complaint on
3 Manuel, right? You knew that. You were giving him information
4 for his Complaint.

5 A. Okay, ma'am. Manuel, was that his name? Manuel.

6 Q. The guy at the bus stop that was detained.

7 A. Okay. That was something more that myself and Officer
8 Powdrell did not know about him.

9 Q. Okay.

10 A. We did not know. All we -- All -- Manuel was going to get
11 a criminal trespass, but it escalated to something else we did
12 not know about.

13 Q. You were not involved -- or you don't know anything about
14 the charges against --

15 A. Manuel, no, ma'am, we didn't.

16 Q. But you were interviewed by Officer Galvan about what
17 happened that day, right?

18 A. Yes.

19 Q. And it was important for you to tell him the truth about
20 what happened between you and Mr. Hernandez.

21 A. Yes.

22 Q. And you told him that -- You told Alfonso to get back, to
23 get away from you. You told him that, didn't you?

24 A. As I stated, ma'am, we're talking about 2012. This is
25 2019. I don't have no recollection of that, of the

1 conversation in hand.

2 Q. So you don't -- you don't disagree with me that you
3 claimed to have told Officer Galvan --

4 A. I'm not disagreeing. I'm not agreeing. I just stated, I
5 don't have no recollection.

6 Q. And you told Officer Galvan in his investigation of Manuel
7 that Alfonso continued to videotape and remained in close
8 proximity after you told him to get back. You told him that,
9 right?

10 A. I have no recollection of the conversation, ma'am. That
11 was so long ago.

12 Q. Well, that's not true, is it? You never asked --

13 A. I can't say it's true; I can't say it's not true.

14 Q. Well, you saw the video. You never asked Alfonso --

15 A. I never asked him.

16 Q. Okay. You never asked him to get back, and he didn't get
17 closer after you asked him to get back, because that never
18 happened, right?

19 A. I don't believe so, ma'am.

20 Q. And when you talked to Officer Galvan, you just told him
21 that you feared a battery, not that one happened, right?

22 A. Ma'am, I'm not going to let nobody swing on me and just
23 stand there and take it. I'm going to defend myself the best
24 way as possible. Not saying I'm proud of doing it, not saying
25 I'm happy about it, not saying any of those things, but I tried

1 to de-escalate the situation in hand.

2 Q. My question was, Mr. Fitzgerald, you did not tell Officer
3 Galvan that Mr. Hernandez supposedly swung at you. You didn't
4 tell him that.

5 A. Ma'am --

6 Q. Right?

7 A. Ma'am, seven years ago, a lot of words around that area.
8 I don't know if I did or if I didn't, but I did write in my
9 statement, APD's form that was submitted by me.

10 Q. That was later.

11 A. Yes, ma'am.

12 Q. That was after you had time to think about things, right?
13 That was later?

14 A. Yes, ma'am.

15 Q. It was the next day?

16 A. Ma'am, seven years ago, but it is written. I can't say it
17 was the next day. I can't say it was that day.

18 Q. But what you told Officer Galvan, you told him on the
19 scene right after all this happened, and that was the truth,
20 right, that you were never touched by Mr. Hernandez?

21 A. It's in my statement, ma'am.

22 Q. So you remember that?

23 A. You also asked me the time to think about it. I had to
24 collect all of my thoughts after that incident, ma'am.

25 Q. Now, having looked at the video, Mr. Fitzgerald, you got

1 Mr. Hernandez on the ground and he was completely in handcuffs
2 before you left him, right, and you moved to Manuel? You had
3 handcuffs on right away, right?

4 A. I didn't place the handcuffs on him, ma'am. My partner
5 did.

6 Q. You guys did that together, didn't you?

7 A. We did it together, but not my handcuffs.

8 Q. So you know he was in handcuffs -- Moments after you got
9 him to the ground you got the handcuffs on, right?

10 A. Yes, ma'am.

11 Q. And when you took him to the ground you didn't have any
12 difficulties getting the handcuffs on him, right?

13 A. If I looked at the video correctly, my partner said, "Give
14 him the other hand." He had his hand -- I can't remember which
15 one, but he had it tucked under.

16 Q. Well, he wasn't resisting or threatening you-all in any
17 way, right?

18 A. Resisting, yes.

19 Q. Do you recall in your deposition --

20 MS. OLIVEROS: On page 37, counsel, lines 12 to 15.

21 Q. -- I asked you the question: "Do you recall that
22 Mr. Hernandez was struggling in any way when you were trying to
23 get the handcuffs on him?"

24 Your answer: "No, ma'am."

25 Do you recall that testimony under oath at your

1 deposition?

2 MS. MARTINEZ: Your Honor, out of completeness, if
3 she could read from lines 15 to 20.

4 THE COURT: You can do so on your examination of the
5 witness.

6 But for now you may move on, Ms. Oliveros.

7 Q. (By Ms. Oliveros) Do you recall that testimony?

8 A. Two years ago. All I know, he had his hand tucked under
9 him, ma'am. That's all I know.

10 Q. I'm sorry --

11 A. Struggling.

12 Q. -- I didn't hear you.

13 A. You asked me was he struggling. All I know, he had his
14 hands -- his hand -- I'm sorry -- underneath him.

15 Q. Well, he wasn't threatening you and he wasn't threatening
16 Officer Powdrell, right?

17 A. I don't believe he was, ma'am, but we was -- we was trying
18 to stop whatever.

19 Q. He wasn't threatening you or Mr. Powdrell when you were
20 getting his handcuffs on him, right?

21 A. We tried to stop the threat, ma'am. Like I said, he had a
22 cell phone.

23 Q. He didn't threaten you physically in any way, right?

24 A. Ma'am, he took a swung [sic] at me and I blocked it.

25 Q. I understand that's what you're saying now. But I'm

1 saying, once he was in his handcuffs and when you're getting
2 the handcuffs on and when he was in them, he never threatened
3 you physically at all.

4 A. After that, no.

5 Q. Never?

6 A. No.

7 Q. When he was on the ground. Because you're saying the only
8 time that he supposedly did something to you, that was when he
9 was standing up. Right?

10 A. Right.

11 Q. So when he was on the ground, no threats at all?

12 A. No.

13 Q. Not physically, right?

14 A. No.

15 Q. And not verbally?

16 A. No.

17 Q. There was nothing that he did that we didn't see that you
18 thought was threatening to you?

19 A. Right.

20 Q. No?

21 A. No.

22 Q. And there's nothing that Mr. Hernandez did that you saw
23 that he was threatening Officer Powdrell, right?

24 A. No, ma'am.

25 Q. Or anyone else?

1 A. No, ma'am.

2 Q. Now, I just want to clarify. You said that your
3 deposition was two years ago. It was in November of 2000- --
4 November 8th of 2017. Do you recall that?

5 A. Yes, and it was not a very good one after I saw you,
6 ma'am.

7 Q. It was what?

8 A. It was not a very good one after I saw you.

9 Q. That day?

10 A. Yes, ma'am.

11 Q. Because I took your deposition?

12 A. No, not you personally. Right after I left from you.

13 Q. Well, that has nothing to do with this lawsuit.

14 A. No, ma'am.

15 Q. All right. Now, do you claim, Mr. Fitzgerald, that the
16 plaintiff, Mr. Hernandez, is responsible for you losing your
17 job?

18 A. All I can say, ma'am, I thought I was doing the right
19 thing.

20 Q. Do you remember at your deposition when you testified, on
21 page 134, lines 20 to 21: "Yes, I did lose my job behind it
22 because of his actions"? Do you recall that testimony?

23 A. Vaguely. His conduct.

24 Q. So you blame him for you losing your job at the City of
25 Albuquerque?

1 A. Yes.

2 Q. And not the other -- not anything else that you did while
3 you were there?

4 A. None that I can think -- None that I can say or none that
5 I can think of, ma'am.

6 Q. And do you also blame Mr. Hernandez for your -- a divorce
7 from your wife? Do you blame him for that, too?

8 A. That would be a separate -- separate issue, ma'am.

9 Q. Do you blame him for something that happened to you and
10 your family, that he -- Did he cause a breakup?

11 A. Again, ma'am, that is a separate issue.

12 Q. Well, remember at your deposition you were shaking your
13 head and I asked you "Why did you do that?" Page 134, lines 11
14 to 16. And you said -- You had been shown the video. You said
15 "Because I didn't want to see it. That's what caused -- that's
16 what caused my family part of it."

17 I asked you: "Do you blame Mr. Hernandez for that,
18 what happened to you?"

19 You answered: "Yes.

20 "Why do you blame him?

21 "Because, ma'am, what myself and Mr. Powdrell had
22 done should never had come to extreme. I'm at a loss for
23 words. Yes, I did lose my job behind it because of his
24 actions."

25 And then at lines 22 to 25: "What actions do you

1 feel that Mr. Hernandez did that were responsible for you to
2 lose your job and your family?

3 "His actions were intervened. When he was asked to
4 move, he should have moved. When I asked him, 'Who are you?'
5 he didn't identify himself."

6 Do you recall that testimony?

7 A. Two years ago, that was a lot with you, counsel.

8 Q. But you did blame Mr. Hernandez for something -- your loss
9 of your family or your divorce, right?

10 A. Not only with him, but within myself, ma'am.

11 Q. You didn't say that at your deposition, did you?

12 A. No, I did not.

13 Q. But you got your job -- you appealed your termination with
14 the City and you got your job back and they paid you \$5,000
15 this year, right?

16 A. I didn't get my job back, ma'am.

17 Q. So they cleared your name, that you weren't fired, right?

18 A. They changed it to a resignation, ma'am.

19 Q. And that was in 2019, from -- You were terminated in 2013,
20 right?

21 A. Yes, ma'am.

22 Q. You said because of -- because of this, supposedly, or a
23 part of this. But in 2019 the City gave you -- allowed you to
24 say you resigned, right, for --

25 A. That's what I was told, ma'am.

1 Q. Well, you won it that day. You knew that you -- that's
2 what you were going for.

3 A. Ma'am, I had no idea they was still working on this. I'm
4 in one state. Here I am in New Mexico. I did not know they
5 was working on that still.

6 Q. And so while the City -- Oops, excuse me.

7 So the City gave you -- they cleared your name and
8 they gave you \$5,000, right, as some kind of settlement?

9 A. I believe that's what it was, ma'am.

10 Q. And do you have any idea why they would do that right now,
11 in 2019 --

12 A. Ma'am --

13 Q. -- the City would settle?

14 A. Ma'am, I'm not in this state anymore. I couldn't even
15 answer that for you.

16 Q. Well, they're going to pay the -- they're going to pay any
17 judgment in this case, right?

18 MS. MARTINEZ: Objection, Your Honor.

19 THE COURT: Sustained.

20 Ms. Oliveros, just about how much longer do you have
21 with this witness?

22 MS. OLIVEROS: Probably 15 or 20 minutes, Your Honor.

23 THE COURT: Okay. I'm just seeing we're at five
24 minutes till noon where we would ordinarily take a lunch break,
25 but ten more minutes. So we will not take a lunch break. It's

1 five till, but you may wrap up. You have ten more minutes.

2 MS. OLIVEROS: Okay.

3 THE COURT: Okay?

4 MS. OLIVEROS: Thank you, Your Honor.

5 Q. (By Ms. Oliveros) Officer Fitzgerald, you heard in the
6 video clip, you said to Manuel, "I'm going to unleash on you."
7 Do you recall that? That was your voice, wasn't it?

8 A. I believe it was.

9 Q. Excuse me?

10 A. I believe it was.

11 Q. That was your voice, and you said to Manuel, "I'm going to
12 unleash on you," right?

13 A. Yes.

14 Q. And you said that because -- Did you see him with a phone?

15 A. He -- He didn't have a phone, ma'am.

16 Q. Manuel?

17 A. No.

18 Q. So what -- why were you threatening him?

19 A. That was unprofessional on my part, I do admit.

20 Q. Well, that's a threat of force, right? You were
21 threatening to physically use force against him, weren't you?

22 A. No.

23 Q. What did you mean by when you said, "I'm going to unleash
24 on you"? What did you mean?

25 A. He wasn't touched at all, ma'am. At all.

1 Q. What did you mean by that, Mr. Fitzgerald?

2 A. I guess when he moved he made me mad by moving. He moved,
3 and I guess out of -- I wasn't thinking at the time because
4 Mr. Hernandez -- after I was upset about the phone camera.
5 Everything was going on around myself. I was already upset.

6 Q. You were on red alert?

7 A. Yes.

8 Q. And you were -- you're saying you didn't know what was
9 going on?

10 A. No, I'm not saying -- I said besides what was going on, I
11 tried to grasp it all.

12 Q. Were you in survi- -- Where you in what you call survival
13 mode right then?

14 A. Yes, ma'am.

15 Q. So in survival mode, you got Mr. Hernandez on the ground.
16 He was -- He was handcuffed, right?

17 A. Yes, ma'am.

18 Q. And then you moved to Manuel, and you threatened him by
19 saying you were going to unleash on him, right?

20 A. Yes.

21 Q. And then you moved back to Mr. Hernandez after that,
22 right?

23 A. I believe I did, ma'am.

24 Q. And that's when you put your hands on him, right?

25 A. Ma'am, choking him, no, because the bus was right there.

1 I did not choke him.

2 Q. You had your hands around his neck, didn't you?

3 A. Hands around his neck, no.

4 Q. Do you remember what you did right then or not?

5 A. Ma'am, survival mode. I have no recollection of this back
6 in 2012.

7 Q. You had your hands on Mr. Hernandez's throat --

8 A. Okay.

9 Q. -- and never let go, did you?

10 A. Ma'am, survival mode. I have not choked Mr. Hernandez.

11 Q. And Akeem Powdrell was right there --

12 A. Ma'am --

13 Q. -- and he --

14 A. -- I don't remember. I wasn't paying attention.

15 Q. -- he called your name 11 times and you did not stop
16 choking Mr. Hernandez, did you?

17 A. I did not choke him and I was not paying attention to
18 Akeem and I was not keeping count of how many times he called
19 my name.

20 Q. You don't recall because you were in survival mode.

21 That's what you said in your deposition, isn't it?

22 A. Yes, ma'am.

23 Q. And you could have killed him. You know that.

24 A. Are you asking me --

25 Q. Yes.

1 A. -- if I could have killed him?

2 Q. Yes, you could have killed him.

3 A. No. That is not in my mind frame, ma'am.

4 Q. Now, Officer Fitzgerald, after this assault, or you can
5 call it whatever you want, after your encounter with
6 Mr. Hernandez, you never told anybody, you never came forward
7 and told anybody the truth about the fact that you laid your
8 hands on him, did you?

9 A. Laid my hands on him, no.

10 Q. Now, afterward there were many minutes where Mr. Hernandez
11 was in handcuffs and sitting there. And you knew that he
12 wasn't intoxicated or anything, right?

13 A. From my -- Excuse me. From my understanding, I don't know
14 who asked him, I can't say, but the officers asked him -- no,
15 either asked or told him that his eyes were red and he smelled
16 like liquor. That part, no.

17 Q. That wasn't you, then?

18 A. That wasn't me. I didn't ask that question.

19 Q. To your personal memory?

20 A. Yeah, he wasn't liquored up, but all the officers say he
21 was liquored up and his eyes was red.

22 Q. But that wasn't true, was it?

23 A. No, ma'am, it wasn't.

24 Q. And you remember that, that specifically that he didn't
25 smell of alcohol and he didn't appear to be drunk to you,

1 right?

2 A. Unless he came in contact with Mr. Bustamante, that's the
3 only way, ma'am, that the smell, but he wasn't liquored up at
4 all.

5 Q. And you never saw him come into close contact with
6 Mr. Bustamante like that? What you saw --

7 A. What I saw, I -- I haven't seen it.

8 Q. You never saw it?

9 A. No, ma'am.

10 Q. Now, you heard your attorney talk about Michael Herrick.
11 Do you know who that is?

12 A. Ma'am.

13 Q. Michael Herrick.

14 A. It's not a personal friend. I never seen him in a day in
15 my life. Never.

16 Q. And you never saw him at the bus stop during when you had
17 your encounter with Alfonso, right?

18 A. No.

19 Q. No?

20 A. I wasn't panning in that direction. No.

21 Q. He's a white man and he's in the video, but you did not
22 see him?

23 A. No. After the fact, that's when I saw him, but I never
24 seen him, know his name, who he works for, anything.

25 Q. So as far as you're concerned, what happened between you

1 and Mr. Hernandez, Michael Herrick has absolutely nothing to do
2 with it?

3 A. No, ma'am.

4 Q. No, ma'am, he has nothing do with it?

5 A. No, ma'am, has nothing to do with it.

6 Q. So -- And your decisions to handcuff him and detain him
7 and take him down, that had nothing to do with Michael Herrick?

8 A. No. Not at all.

9 Q. And you agree, like I think we went over this, but if --
10 if you harm someone, even if you're in survival mode you're
11 responsible for that, aren't you?

12 A. Yes.

13 MS. OLIVEROS: I pass the witness, Your Honor.

14 THE COURT: Okay. It is just about five minutes
15 after noon. Ladies and gentlemen, thank you for your attention
16 this morning. We went fairly long, but we'll take a break at
17 this time. Please be back in the deliberation room so we can
18 get started again by five minutes after 1:00.

19 I have to give you the instruction similar to what I
20 gave you originally. Please do not discuss the case while
21 we're on break.

22 All right. Please rise for the jury.

23 (Jury out at 12:07 p.m.)

24 THE COURT: All right. Mr. Fitzgerald, you may step
25 down.

1 THE WITNESS: Thank you, Your Honor.

2 THE COURT: All right. Does counsel need to be heard
3 on anything at this particular time?

4 MS. OLIVEROS: I don't think so.

5 THE COURT: Sir?

6 THE WITNESS: No, I didn't mean it. I thought it had
7 wheels. I was like oh, oh.

8 THE COURT: Oh, that's fine. You may return to
9 counsel table.

10 MS. MARTINEZ: No. Thank you, Your Honor.

11 THE COURT: Nothing from counsel?

12 Ms. Oliveros? Nothing?

13 MS. OLIVEROS: Oh, I'm sorry. Yes, sir.

14 THE COURT: Okay. Let me just ask if there's going
15 to be additional video evidence presented, I would just ask
16 counsel to be a little more timely in getting it started. I
17 understand there's no perfect system, but if we can just avoid
18 the delay in getting it started that would be very helpful.

19 All right. We'll be in recess.

20 (Court stood in recess at 12:08 p.m. and resumed at
21 1:07 p.m.)

22 THE COURT: Okay. We don't have Louren Oliveros just
23 yet?

24 MS. KAIA OLIVEROS: Not yet.

25 THE COURT: Okay. Well, we'll just wait until she

1 comes back in, so we'll be in recess just a moment.

2 (Court stood in recess at 1:07 p.m. and resumed at
3 1:09 p.m.)

4 THE COURT: Okay. Back on the record. Please be
5 seated.

6 All right. Does counsel want to wish -- wish to
7 bring up anything before the Court at this time?

8 MS. MARTINEZ: Your Honor, the only issue that I have
9 to make a record of is the fact that plaintiff elicited or made
10 a statement that any judgment would be paid by the City of
11 Albuquerque, and I object to it because -- and I didn't make a
12 speaking objection because I didn't want to draw attention to
13 it in front of the jury, but I am going to need some time to
14 research that issue and find out what the cure to that
15 statement was.

16 THE COURT: Yes, ma'am. Okay. And I sustained the
17 objection, but I'll entertain anything else you might have as
18 to curing --

19 MS. MARTINEZ: Thank you, Your Honor.

20 THE COURT: -- with a limiting instruction or
21 anything to that extent. But before we go on with that,
22 Ms. Oliveros, what is -- what's the thought process in asking a
23 question about whether the City would be the party or the
24 entity that pays on the judgment or any sort of, well, payment
25 as a result of this lawsuit?

1 MS. OLIVEROS: Well, Your Honor, the testimony was
2 about the City and the settlement with the City about his
3 termination related to this lawsuit, and there was no motion
4 in limine on it, and I think it seemed to me that it was
5 relevant to also ask about his -- you know, the City would be
6 paying for this lawsuit. It just settled with him on the
7 termination that came up with this lawsuit, so I think it's
8 relevant to that. And their motive to -- the City's motive to
9 change the facts of this case is relevant to his testimony and
10 his relationship with the City.

11 THE COURT: Okay. Okay. Let me note, the jury
12 should be ready to come on in, but before I call them in or
13 even line them up I'm going to want a few minutes with
14 Ms. Oliveros and Ms. Martinez, just the attorneys, Ms. Oliveros
15 and Ms. Martinez. So I'm going to close the courtroom for this
16 brief -- very brief meeting that I'm going to have with the
17 attorneys, so for a few minutes I'll just ask everybody in the
18 public gallery to step out for the moment.

19 MS. OLIVEROS: Our staff?

20 THE COURT: Yes.

21 (People from the courtroom were cleared from the
22 courtroom. Courtroom sealed.)

23 (Separate transcript of sealed portion.)

24 * * * * *

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1 C-E-R-T-I-F-I-C-A-T-E

2 UNITED STATES OF AMERICA

3 DISTRICT OF NEW MEXICO

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5 I, Danna Schutte Everett, RPR, CCR, CRR, Official
6 Court Reporter for the State of New Mexico, do hereby
7 certify that the foregoing pages constitute a true
8 transcript of proceedings had before the said Court held
9 in the city of Albuquerque, New Mexico, in the matter
10 therein stated.

11 In testimony whereof, I have hereunto set my hand on
12 this 4th day of June, 2019.

13

14

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